SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JUN 22 1967
JOHN F. DAVIS, CLERK

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1967

No. 281

WING WA LEE,
*Petitioner,*

vs.

IMMIGRATION AND NATURALIZATION SERVICE,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI
## to the United States Court of Appeals
## for the Ninth Circuit

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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## PETITION FOR A WRIT OF CERTIORARI
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for the Ninth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming an order of the Immigration and Naturalization Service denying a motion to reopen.

### JURISDICTION

The judgment of the Court of Appeals was entered on March 28, 1967. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Are crewmen eligible to adjust their status pursuant to section 203(a)(7) of the Immigration and Nationality Act of 1952 as amended?

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## STATUTE INVOLVED

Immigration and Nationality Act, as amended, section 203(a), 8 U.S.C. (1964 ed. Supp. I) 1153(a).

> "(7) Conditional entries shall next be made available by the Attorney General, pursuant to such regulations as he may prescribe and in a number not to exceed 6 percentum of the number specified in section 201(a) (ii), to aliens who satisfy an Immigration and Naturalization Service officer at an examination in any non-Communist or non-Communist-dominated country, (A) that (i) because of persecution or fear of persecution on account of race, religion or political opinion they have fled (I) from any Communist or Communist-dominated country or area, or (II) from any country within the general area of the Middle East, and (ii) are unable or unwilling to return to such country or area on account of race, religion, or political opinion, and (iii) are not nationals of the countries or areas in which their application for conditional entry is made; or (B) that they are persons uprooted by catastrophic natural calamity as defined by the President who are unable to return to their usual place of abode. For the purpose of the foregoing the term 'general area of the Middle East' means the area between and including (1) Libya on the west, (2) Turkey on the north, (3) Pakistan on the east, and (4) Saudi Arabia and Ethiopia on

the south: Provided, That immigrant visas in a number not exceeding one-half the number specified in this paragraph may be made available, in lieu of conditional entries of a like number, to such aliens who have been continuously physically present in the United States for a period of at least two years prior to application for adjustment of status."

Section 245, 8 U.S.C. (1964 ed.) Sec. 1255:

"(a) The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved. * * *"

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## REGULATIONS INVOLVED

Title 8 Code of Federal Regulations [Rev. January 1, 1966]:

Section 245.1 *Eligibility.*

"(a) General. An alien who on arrival in the United States was serving in any capacity on board a vessel or aircraft, or was destined to join a vessel or aircraft in the United States to serve in any capacity thereon, or was not admitted or paroled following inspection by an im-

migration officer is not eligible for the benefits of section 245 of the Act."

* * *

(d) *Immediate relatives under section 201(b) and preference aliens under section 203(a)(1) through 203(a)(7).*

"* * * An alien who claims preference status under the proviso to section 203(a)(7) of the Act is not eligible for the benefits of section 245 of the Act and as provided in section 245.5, unless the District Director has approved the alien's Application for Classification as a Refugee under the Proviso to Section 203(a)(7), Immigration and Nationality Act." [31 F.R. 535, January 15, 1966].

Section 245.4 *Adjustment of status under the proviso section 203(a)(7) of the Act.*

"The provisions of section 245 of the Act and this part shall govern the adjustment of status provided for ir the proviso to section 203(a)(7) of the Act. Processing of applications for adjustment under the proviso to section 203(a)(7) and this section shall be initiated in each district in the chronological order in which the applicants last arrived in the United States. An alien who claims he is entitled to a preference status pursuant to the proviso to section 203(a)(7) of the Act shall execute and attach to his application for adjustment of status Form I-590A, Application for Classification as a Refugee under the proviso to Section 203(a)(7), Immigration and Nationality Act. The determination as to whether an alien is entitled to the claimed preference status shall be made by the district director;

no appeal shall lie from his determination." [31 F.R. 536, January 15, 1966].

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**STATEMENT OF THE CASE**

The petitioner is a native and citizen of China who last entered the United States at Los Angeles on September 30, 1962, as a crewman. He has remained in the United States continuously since that date. He was ordered deported to Formosa or Macao by a special inquiry officer on May 6, 1963. No appeal was taken and the order became final.

However, the respondent was unable to effect deportation to either place, and therefore moved to reopen the proceedings so that an order might be entered for petitioner's deportation to Hong Kong. Petitioner appealed and on July 29, 1965, the Board of Immigration Appeals dismissed petitioner's appeal and affirmed the deportation order to Hong Kong.

Thereafter, on October 3, 1965, the Immigration Laws were amended by P.L. 89-236. Among the amendments were substantial changes in the quota preference system, including section 203(a)(7) which provides for conditional entries into the United States for refugees, and provides further

> "that immigrant visas in a number not exceeding one-half the number specified in this paragraph may be made available, in lieu of conditional entries of a like number, to such aliens who have been continuously physically present in the United States for a period of at least two years prior to *application for adjustment of status.*" (Emphasis added.)

The petitioner moved to reopen the deportation proceedings for the purpose of applying for adjustment of status under section 203(a)(7). The motion to reopen was denied by the Board of Immigration Appeals on June 1, 1966, on the ground that petitioner was not eligible under section 203(a)(7), because section 245 provides that crewmen are ineligible to adjust status.

The Board apparently assumed that the words, "application for adjustment of status," as contained in section 203(a)(7) meant application for adjustment of status under section 245.

Petitioner then sought review of the administrative order in the United States Court of Appeals for the Ninth Circuit. The administrative order was affirmed. (See appendix A.)

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## REASON FOR GRANTING THE WRIT

We are fully aware that this Court on April 24, 1967, denied the petition for a writ of certiorari in a group of cases raising this same question: *Tai Mui v. P. A. Esperdy, as District Director of the Immigration and Naturalization Service for the District of New York,* No. 1037; *Chan Hing* and *Lai Cho v. P. A. Esperdy, as District Director of the Immigration and Naturalization Service for the District of New York,* No. 1038; and *Woo Cheng Hwa v. Immigration and Naturalization Service,* No. 1090.

In those cases counsel did not raise the one issue which we think deserves the Court's attention. We refer to the failure of the Attorney General to distinguish between substantive and procedural requirements in applying section 245 to applications for adjustment of status under section 203(a)(7).

As enacted, section 203(a)(7) provides that aliens who meet two requirements: (1) That they be refugees; and (2) That they have been physically present in the United States for a period of at least two years prior to adjustment of status, may be allocated up to one-half of the quota numbers provided in that section.

This petitioner meets both requirements, but the Attorney General contends that the petitioner cannot qualify under section 203(a)(7) because he entered the United States as a crewman.

Crewmen are ineligible for adjustment of status under the substantive provisions of section 245, and the Attorney General says section 245 is the *procedure* for adjustment in section 203(a)(7) cases.

In support of his position, the Attorney General points out that section 203(a)(7) provides no *procedural* avenue for obtaining relief. This is true. But we would point out that section 13 of the Act of September 11, 1957, provided for adjustment of status and did not provide a procedural avenue for the relief.

The Attorney General found no difficulty in applying the procedural requirements of section 245 to

adjustment of status cases under section 13 of the Act of September 11, 1957, but did not apply the substantive requirements. As a matter of fact, Form I-485, prior to its recent amendment was used for applications for adjustment of status under sections 245, 249, section 13 of the Act of September 11, 1957, and section 203(a)(7). A copy is annexed as appendix B.

The same *procedure*—that of section 245—was followed in all four types of cases, but the substantive requirements were different in each case. And only in section 203(a)(7) cases did the Attorney General attempt to impose the substantive requirements of section 245.

We submit that the Attorney General is improperly imposing a substantive requirement in this case not specifically contained in section 203(a)(7). Certainly, if Congress intended the substantive provisions of section 245 to apply to applications for adjustment of status under section 203(a)(7), they would simply have included the following phrase, "under section 245," at the end of the proviso to section 203(a)(7). But Congress did not do so, and the legislative history of section 203(a)(7), scarce though it might be, does not indicate an intent to apply such a requirement to the section.

It seems clear that Congress meant no more than to apply the *procedural* requirements of section 245 to section 203(a)(7), but whether or not Congress intended to apply the substantive requirements of section 245 to section 203(a)(7), the fact remains that the statute does not include such a provision.

We submit that the Attorney General cannot, by regulation, impose substantive requirements not specifically contained in the statute.

As this Court pointed out in *Dixon v. United States,* 381 U.S. 68, 85 S.Ct. 1301, Congress, and not the Commissioner, prescribes the tax laws, and the power of an administrative officer, or board, to administer a Federal statute and to prescribe rules and regulations to that end is not the power to make law, but the power to adopt regulations to carry into effect the will of Congress *as expressed by the statute.* The Attorney General has attempted to create a rule out of harmony with the expressed language of the statute, and therefore, as in *Dixon v. United States,* supra, it is a nullity.

We should remember that the petitioner, and several hundred other aliens in like circumstances, face deportation to Hong Kong if they are held ineligible under section 203(a)(7). The Attorney General admits that there are no provisions available in the Orient which would permit these aliens to apply for conditional entry under section 203(a)(7). Therefore, these aliens, unlike European refugees, cannot return to the United States as refugees.

In *Fong Haw Tan v. Phelan,* 333 U.S. 6 (1948), and in *Delgadillo v. Carmichael,* 332 U.S. 388, at 391, 68 S.Ct. 10, this Court recognized the harshness of deportation statutes and resolved doubts in the statutory construction in favor of the aliens because deportation is a drastic measure, at times the equivalent of banishment or exile. It is true that the statute

under consideration in this petition is not a deportation statute, but the results are the same.

To construe the statute in such a manner that substantive requirements not specifically included therein bar these aliens from eligibility will cause their deportation—a harsh result—the equivalent of banishment or exile.

Our position is clear. This Court has not permitted administrative construction of statutes which would produce harsh consequences by the imposition of requirements not specifically included in the language of the applicable statute. The Court should not permit such a construction in this case.

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## CONCLUSION

Because of the number of aliens who will be affected by this issue, and the grave consequences that they (including the petitioner) face if the petition is denied, and because of the serious question of statutory construction involved, we respectfully pray that a writ of certiorari issue.

Dated, San Francisco, California,
June 12, 1967.

Respectfully submitted,
MILTON T. SIMMONS,
*Attorney for Petitioner.*

**(Appendices Follow)**

## Appendix A

United States Court of Appeals
for the Ninth Circuit

| | |
|---|---|
| WING WA LEE, *Petitioner,* vs. IMMIGRATION AND NATURALIZATION SERVICE, *Respondent.* | No. 21,060 |

[March 28, 1967]

Petition for Review of an Order of the
Immigration and Naturalization Service

Before: CHAMBERS, BARNES and HAMLEY, Circuit Judges

BARNES, Circuit Judge:

Petitioner Wing Wa Lee is a native and citizen of China, born in Shanghai. Apparently having fled from the Communist conquest of mainland China, he lived in Hong Kong from 1948 to 1953 when he was deported to Macao by British authorities. In 1954 he returned to Hong Kong. In 1958 he went to sea under seaman's papers issued by Hong Kong authorities. His wife and four children live in Macao.

On or about September 30, 1962 Wing Wa Lee entered the United States as a crewman, being authorized to stay so long as his vessel remained in port, but in no event more than 29 days. He did not depart

with his ship but remained in this country. Deportation proceedings were begun against him on April 5, 1963, and he was ordered deported to the Republic of China (Formosa) or Macao. Neither government was willing to accept him, so on May 19, 1965 he was ordered deported to Hong Kong.

On October 3, 1965 the Immigration and Nationality Act was amended by Pub. L. 89-236, 79 Stat. 911 (1965). Of particular interest is the new section 203(a)(7) (8 U.S.C. § 1153(a)(1)) which provides, inter alia, that refugees from Communism shall have a preference in the form of conditional entries into the United States. The section ends with the provision:

> "*Provided,* That immigrant visas in a number not exceeding one-half the number specified in this paragraph may be made available, in lieu of conditional entries of a like number, to such aliens who have been continuously physically present in the United States for a period of at least two years prior to application for adjustment of status."[1]

Petitioner Wing Wa Lee wants to bring himself within the refugee provisions of section 203(a)(7). Since he has been in this country for more than two years, he would like to obtain an immigrant visa under the proviso just quoted. In order to do so, he attempted to make an application for adjustment of

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[1] Apparently the difference between an immigrant visa and a conditional entry is that if the alien is found undesirable he can be "excluded" under a conditional entry but must be "deported" under an immigrant visa. The difference is not relevant to our disposition of this case.

status, and moved that the proceedings be reopened for that purpose. The petition was denied, and Wing Wa Lee has petitioned for review of that denial. We have jurisdiction under 8 U.S.C. § 1105a. See *Giova v. Rosenberg,* 379 U.S. 18 (1964), *reversing* 308 F.2d 347 (9th Cir. 1962).

Wing Wa Lee contends that he has the right to file an application for adjustment of status under section 203(a)(7). The government contends that the application for adjustment of status must be filed under section 245 (8 U.S.C. § 1255), which specifically excludes from such consideration aliens who entered the country as crewmen. The parties ask us to decide whether the adjustment of status referred to in section 203(a)(7) is necessarily the procedure of section 245. The facts of this case do not require us to decide this particular question, so we decline to express any opinion on it.

Section 203(a)(7) does not create any new procedure for adjustment of status; it merely refers to the application for such adjustment as a reference point for determining the period of presence in the United States. Congress has been both very careful and very specific in authorizing the Attorney General to adjust the status of aliens. Note the rigid limitations of sections 244 (8 U.S.C. § 1254), 245 (8 U.S.C. § 1255), 247 (8 U.S.C. § 1257), and 249 (8 U.S.C. § 1259).[2] It is clear that in section 203(a)(7) Congress was

[2]Petitioner argues that section 249 is an adjustment of status provision, though not so entitled. For the disposition of this case we can assume, for the sake of argument, that section 249 is such a provision.

providing for the immigration of refugees and not defining any new method of adjustment of status. There is no language in section 203(a)(7) which authorizes the Attorney General to adjust any alien's status. Adjustment provisions must be found somewhere other than section 203(a)(7).

The government argues that the reference of section 203(a)(7) to adjustment of status is exclusively to the procedure and requirements of section 245.[3] As mentioned above, we find it unnecessary to consider whether section 245 is the exclusive method of adjustment of status within section 203(a)(7). But see *Tai Mui v. Esperdy,* 371 F.2d 772 (2d Cir. 1966) (petition for *certiorari* pending). It is unnecessary because petitioner cannot bring himself within *any* adjustment of status provision: (1) he has not been physically present in the United States for seven years, nor has he served in the Armed Forces of the United States, so section 244 does not apply; (2) he is an alien crewman, so his status cannot be adjusted under section 245; (3) he is not an alien lawfully admitted for permanent residence, so section 247 does not apply; and (4) he did not enter the United States prior to June 30, 1948, so section 249 does not apply.

Petitioner's motion to reopen was denied on the ground that he was barred under section 245 from having his status adjusted. While we do not decide

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[3]We note, as did the government, the legislative history of the 1965 amendment to section 203(a)(7) with its statement: "It is contemplated that such adjustments will be made under section 245 of the Immigration and Nationality Act." S. Rep. No. 748, 89th Cong., 1st Sess. (1965).

that section 245 is necessarily the only adjustment of status provision within the meaning of section 203 (a)(7), since we have found that petitioner's status cannot be adjusted under any provision of the Immigration and Nationality Act, the denial of the motion to reopen will be affirmed.

*Affirmed.*

# Appendix B

Form Approved
Budget Bureau No. 43-R400.2

## APPLICATION FOR STATUS AS PERMANENT RESIDENT

(For use under Section 245, 249 or the proviso to Section 203(a)(7) of the Immigration and Nationality Act or Section 13 of the Act of September 11, 1957)

| FEE STAMP | FILE NO. |
|---|---|
| | APPLICANT FOR BENEFITS OF SECTION LAW |

_____ (Type) Immigrant / Nonimmigrant

visa issued at _____ on _____

(DO NOT WRITE ABOVE THIS LINE) (SEE INSTRUCTIONS BEFORE FILLING IN APPLICATION. IF YOU NEED MORE SPACE TO ANSWER FULLY ANY QUESTION ON THIS FORM, USE A SEPARATE SHEET AND IDENTIFY EACH ANSWER WITH THE NUMBER OF THE CORRESPONDING QUESTION. FILL IN WITH TYPEWRITER OR PRINT IN BLOCK LETTERS IN INK.)

1. I hereby apply for the status of a lawful permanent resident alien on the following basis: (Check appropriate box)
An immigrant visa is immediately available to me: A. ☐ other than as a refugee B. ☐ as a refugee
I have resided in the United States continuously since C. ☐ prior to June 30, 1948 D. ☐ prior to July 1, 1924.

2. My name is (First) (Middle) (Last) | My alien registration number is

I have also used the following names (Married women must show maiden name and names by prior marriages, if any)

3. I reside in the United States at: (Apt. No.) (No. and Street) (City) (State)

4. Date of Birth | Place of Birth (City or Town) (County, Province, or State) (Country) | I am now a citizen of (Country)

| 5. Height ft. in. | Weight lbs. | Eyes | Hair | Complexion | Marks or Scars | 6. Parents' Names |
|---|---|---|---|---|---|---|
| | | | | | | |

7. I last arrived in the United States at the port of (City and State) on (Month) (Day) (Year)

by (Name of vessel or other means of travel) | as a (Visitor, student, U.S. citizen, stowaway, immigrant, etc.)

8. I have resided at the following places: (Applicants who check Block A or B of Item 1 must furnish all places of residence from date five years prior to entry into the United States, up to and including the present time, listing present address first. Applicants who check Block C or D of Item 1 must show all places of residence during the last five years, listing present address first.)

| Street and No. | City | State Province | Country | From Month | From Year | To Month | To Year |
|---|---|---|---|---|---|---|---|
| | | | | | | Present time | |
| | | | | | | | |
| | | | | | | | |
| | | | | | | | |

9. I have been employed at the following places during the past five years (include all United States and foreign employment)

| Full name and address of employer | Type of work I did | From Month | From Year | To Month | To Year |
|---|---|---|---|---|---|
| | | | | Present time | |
| | | | | | |
| | | | | | |

10. I ☐ do ☐ do not intend to seek gainful employment in the United States.

11. I ☐ am ☐ am not married. *(If you are married give the following:)*

a. Date of marriage | b. Date and place of birth of spouse

c. Name of spouse and last address at which you and your spouse resided together
Name Address (Apt. No.) (Number and Street) (Town or City) (State) From (Month and Year) To (Month and Year)

d. Number of times I have been married, including this marriage | e. Number of times my spouse has been married | f. Number of children

g. The following members of my family are also applying for status as permanent residents:

h. Name, date and place of birth and present address of each child:

12. I list below all organizations, societies, clubs, and associations, past or present, in which I have held membership in the United States or a foreign country, and the periods and places of such membership. *(If you have never been a member of any organization, state "None.")*

13. I ☐ have ☐ have not been charged with a violation of law *(other than minor traffic violations)*. *(If you have ever been charged with a violation of law, give date and place and nature of each charge and the final result.)*

14. I ☐ have ☐ have not requested exemption or discharge from training or service in the Armed Forces of the United States. *(If you have ever requested exemption or discharge from training or service in the Armed Forces of the United States, give date and place of your request, the reason for such request, and specify to whom it was made.)*

15. Deportation proceedings ☐ have ☐ have not been instituted against me in the United States. *(If deportation proceedings have ever been instituted against you, give the date and place of hearing, the charge, and the final result.)*

16. I ☐ have ☐ have not been a participant in a designated exchange program. *(If you have been a participant, show dates of arrival and departure from U.S.*

17. *(If you have checked Block A or B of Item 1, complete this item.)* An immigrant visa is now available to me because:
☐ a. I registered on the consular waiting list at the American Consulate at _____ (City) on _____ (Date)
☐ b. A visa petition according me immediate relative / preference status was approved by the district director at _____ (Place) on _____ (Date)
☐ c. A visa petition has not been approved in my behalf but I claim eligibility for immediate relative or preference status because ☐ my spouse ☐ my parent is the beneficiary of a visa petition approved by the district director at _____ (City) on _____ (Date)
☐ d. Other *(explain)*

18. *(If you have checked Block B of Item 1, complete this item.)* A. I ☐ have ☐ have not been absent from the United States during the past two years. *(If you have been absent, attach a separate statement listing the port, date and means of each departure from and return to the United States.)* B. The country from which I fled or the place from which I have been uprooted is
C. The reasons I left and the reasons I am unable or unwilling to return to that country or place are

19. *(If you have checked Block C or D of Item 1, complete this item.)*
A. I first arrived in the United States at _____ (Port) on _____ (Date) by means of _____ (Name of ship or mode of travel) I was / was not inspected by an immigration officer.
B. I entered the United States under the name _____ (Name at time of entry) and I was destined to _____ (City and State) I was coming to join _____ (Name and relationship)
C. Since my first entry I have / have not been absent from the United States. *(If you have been absent, attach a separate statement listing the port, date and means of each departure from and return to the United States.)*

20. I ☐ have ☐ have not heretofore filed an application for the status of a permanent resident. *(If you have ever filed such application, give the date and place of filing and final disposition.)*

| | |
|---|---|
| 21. IF YOUR NATIVE ALPHABET IS IN OTHER THAN ROMAN LETTERS, WRITE YOUR NAME IN YOUR NATIVE ALPHABET BELOW: | Signature of Applicant:<br>Date of Signature: |
| 22. (Signature of person preparing form, if other than applicant.) I declare that this document was prepared by me at the request of the applicant and is based on all information of which I have any knowledge.<br>Date: | Address of person preparing form, if other than applicant<br>Occupation: |

*(Application not to be signed below until applicant appears before an officer of the Immigration and Naturalization Service for examination)*

I, _____, do swear (affirm) that I know the contents of this application subscribed by me including the attached documents, that the same are true to the best of my knowledge, and that corrections numbered ( ) to ( ) were made by me or at my request, and that this application was signed by me with my full, true name:

_____ (Complete and true signature of applicant)

Subscribed and sworn to before me by the above-named applicant at _____ on _____ (Month) (Day) (Year)

_____ — _____ (gnature and title of officer)

# In the Supreme Court of the United States

OCTOBER TERM, 1967

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No. 281

WING WA LEE, PETITIONER

*v.*

IMMIGRATION AND NATURALIZATION SERVICE

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioner is a native and citizen of China, born in Shanghai (R. 25). He claims to have fled from Communist China to Hong Kong, where he lived from 1948 until 1953, when he was deported to Macao by British authorities. He returned to Hong Kong in 1954, and in 1958 went to sea under seaman's papers issued by Hong Kong authorities. His wife and four children live in Macao (R. 39-42).

On September 30, 1962, petitioner entered the United States as a non-immigrant crewman, authorized to remain for no more than 29 days. He deserted his ship and remained in this country (R. 33). On May 6, 1963, he was ordered deported to the Republic of China (Formosa) or to Macao. When neither government proved willing to accept him, he was, on May 19, 1965, ordered deported to Hong Kong (R. 23-24).

Subsequently, petitioner moved to reopen proceedings in order to apply under the refugee relief provisions of the October 1965 legislation which amended the Immigration and Nationality Act to accord priorities in the issuance of immigrant visas to various specified classes of aliens (Pub. Law 89-236, 79 Stat. 911). Specifically, he requested the opportunity to apply for adjustment of status under Section 203(a)(7) (8 U.S.C. 1153(a)(7))—a section which after providing, *inter alia*, for preference in the form of conditional entries for refugees from Communism, ends with the proviso:

> *Provided*, That immigrant visas in a number not exceeding one-half the number specified in this paragraph may be made available, in lieu of conditional entries of a like number, to such aliens who have been continuously physically present in the United States for a period of at least two years prior to the application for adjustment of status.

The motion was denied by the Immigration and Naturalization Service on the ground that petitioner was ineligible for adjustment of status under the

above proviso since Section 245 of the Act (8 U.S.C. 1255), which contains the provisions relating to adjustment of status, specifically excludes alien crewmen from its coverage. On petition for review to the United States Court of Appeals for the Ninth Circuit (see 8 U.S.C. 1105a), the order of denial was affirmed on March 28, 1967 (Pet. App. A; R. 49-52; reported at 375 F.2d 723). The court found it unnecessary to consider whether the reference to adjustment of status in Section 203(a)(7) was exclusively to the procedure and requirements of Section 245, since it found that Section 203(a)(7) did not in and of itself define a right to apply for adjustment of status and that petitioner could not bring himself within the provisions of any of the sections of the Act providing for such adjustment (Pet. App. A iv-v).

Basically, petitioner here contends that his eligibility for adjustment of status must be determined solely by the language of the proviso of Section 203(a)(7) without recourse to any other section of the Immigration and Nationality Act. As he acknowledges, this is essentially the same question which was before this Court last term in *Tai Mui* v. *Esperdy* and related cases, 371 F.2d 772 (C.A. 2), Nos. 1037, 1038, and 1090, 1966 Term, in which certiorari was denied April 24, 1967 (386 U.S. 1017). In those cases, the Second Circuit upheld the validity of regulations of the Attorney General interpreting the proviso of Section 203(a)(7) as referring to adjustment of status under Section 245 and thus making relief thereunder unavailable to alien crewmen. That court, addressing itself to the language and legislative history of the

proviso, concluded that Congress, in making available a limited number of preferential visas to refugees physically present in the country (in lieu of conditional entry preference), intended to accord the preference only to aliens who were entitled to have their status adjusted under existing law rather than to create a new category for the adjustment of the status of alien refugees. See 371 F.2d at 778-779. In support of the position that the section was not an independent and self-sustaining relief provision, the opinion of the Second Circuit, and respondents' memorandum in opposition to the petitions for certiorari in those cases, noted, *inter alia*, that the Senate Report on the 1965 legislation recited that it was contemplated that adjustments of status under the proviso would be made under Section 245 (S. Rep. No. 748, 89th Cong., 1st Sess., 22); that at the same time the section was added to the statutory scheme, Congress amended Section 244 (8 U.S.C. 1254) (relating to suspension of deportation) to make its benefits available to certain alien crewmen, while leaving the absolute ban as to crewmen intact in Section 245; and that it was unlikely, in view of congressional policy toward a class of persons thought to be guilty of frequent abuse of the immigration laws, that the enactment of Section 203(a)(7) was intended to make deserting crewmen indirectly eligible for preferred treatment.[1]

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[1] Petitioner's purported distinction between the procedural and substantive requirements of Section 245 (Pet. 8-9), in regard to its relationship to Section 203(a)(7), is, in view of

Such reasoning is just as applicable here as in these cases, and the factual situation is a substantially identical one. The basic position of the court below is the same as that of the Second Circuit, *i.e.*, that Section 203(a)(7) is not in and of itself an adjustment of status provision. Petitioner's attack on that interpretation presents no issue warranting review by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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the background, language, and legislative history of the latter provision, without merit. Petitioner's contention is essentially that the failure of Congress to specifically exclude alien crewmen from Section 203(a)(7) should be read as meaning that they are eligible for adjustment of status, even though they are expressly excluded from such relief by the adjustment of status provision, Section 245. In our view, by only the most tortured statutory construction can such a result be reached. Rather, the conclusion of the Second Circuit, which is wholly consistent with the holding of the court below, seems plainly reflective of the congressional intent.

## APPENDIX

### Statutes and Regulation Involved

Section 203(a)(7) of the Immigration and Nationality Act, as amended, 8 U.S.C. (Supp. I) 1153(a)(7), 79 Stat. 913, provides:

> (7) Conditional entries shall next be made available by the Attorney General, pursuant to such regulations as he may prescribe and in a number not to exceed 6 per centum of the number specified in section 201(a)(ii), to aliens who satisfy an Immigration and Naturalization Service officer at an examination in any non-Communist or non-Communist-dominated country, (A) that (i) because of persecution or fear of persecution on account of race, religion, or political opinion they have fled (I) from any Communist or Communist-dominated country or area, or (II) from any country within the general area of the Middle East, and (ii) are unable or unwilling to return to such country or area on account of race, religion, or political opinion, and (iii) are not nationals of the countries or areas in which their application for conditional entry is made; or (B) that they are persons uprooted by catastrophic natural calamity as defined by the President who are unable to return to their usual place of abode. For the purpose of the foregoing the term "general area of the Middle East" means the area between and including (1) Libya on the west, (2) Turkey on the north, (3) Pakistan on the east, and (4) Saudi Arabia and Ethiopia on the south: *Provided*, That immigrant visas in a number not exceeding one-half the number specified in this paragraph may be

made available, in lieu of conditional entries of a like number, to such aliens who have been continuously physically present in the United States for a period of at least two years prior to application for adjustment of status.

Section 245 of the Immigration and Nationality Act, as amended, 8 U.S.C. 1255, provides:

> (a) The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved.
>
> * * * *

8 Code of Federal Regulations 245.4, as amended, 31 Fed. Reg. 536 (January 15, 1966), provides:

> § 245.4 Adjustment of status under the proviso to section 203(a)(7) of the Act.
>
> The provisions of section 245 of the Act and this part shall govern the adjustment of status provided for in the proviso to section 203(a)(7) of the Act. Processing of applications for adjustment under the proviso to section 203(a)(7) and this section shall be initiated in each district in the chronological order in which the applicants last arrived in the United States. An alien who claims he is entitled to a preference status pur-

suant to the proviso to section 203(a)(7) of the Act shall execute and attach to his application for adjustment of status Form I-590A, Application for Classification as a Refugee under the Proviso to Section 203(a)(7), Immigration and Nationality Act. The determination as to whether an alien is entitled to the claimed preference status shall be made by the district director; no appeal shall lie from his determination.

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